Supreme Court, U.S.
FILED

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No. 06-

IN THE

Supreme Court of the United States

LARRY CONWAY and MARILYN CONWAY,

Petitioners,

v.

PRESTON WILSON, Chapter 7 Trustee, and
UNITED STATES Trustee for Region 8, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the actions of the Bankruptcy Court in wrongfully denying a discharge to the debtor and thereafter continuing to administrate the estate of the debtor effectuated a taking of the assets of the debtor thereby constituting an abuse of judicial power for which there is no effective judicial review system under the Bankruptcy Amendments and Federal Judgeships Act of 1984 (BAFJA) by:

   (a) Granting a writ of entry into the home of the debtor(s) by a show of force of the United States Marshall for the purpose of taking said property for sale after the denial of discharge without a hearing or notice; (b) ordering the auctioning of the debtor's property without the filing of an inventory of property taken from the residence of the debtor(s) by the trustee, within one day after the hearing thereby effectively denying the debtor time to appeal; (c) converting the individual Chapter 11 case of the spouse, Marilyn Conway, to a Chapter 7 and thereafter consolidating her case with that of her spouse after the taking of the property of the estate and selling it at an auction; (d) denying to debtor, Marilyn Conway, exemption rights to any property taken and sold at the auction; (f) allowing the Trustee to sell property prior to an inventory/accounting of the items confiscated from the home; (g) allowing an inventory/accounting by the auctioneer of the sale items to be made over six months after the auction; (h) failing to call for an investigation into the allegations by the debtor, with proof, that the assets had been converted by the trustee and/or the auctioneer and allowing the individual chapter 7 bankruptcy case to remain open indefinitely after the

taking of the assets, approximately three years to date and over four (4) years after the date of involuntary conversion.

2. Whether review of the actions of the Bankruptcy Court by the Bankruptcy Appellate Panel and the subsequent affirmation by the United States Appellate Court of the 6th Circuit effectively elevated the Bankruptcy Court to the position of an Article III Court which legislatively bypasses the authority of the District Court in violation of Article III of the Constitution.

3. Whether the review of the decision of the Bankruptcy Appellate Panel pursuant to 28 USCS 158(d) by the 6th Circuit contravenes the grant of appellate jurisdiction under 28 USCS 1291 of final decision(s) of the District court wherein there has not been an actual ratification of the actions of the Bankruptcy Court by the District Court or a review of said actions on appeal to the District Court pursuant to 28 USCS 158(a); 11 USCS 341, 343 and Bankruptcy Rules 2003, 2004 and 2015.

4. Whether a bankruptcy court has jurisdiction to continue to administrate an individual chapter 7 bankruptcy case after a denial of discharge and a denial of dismissal in contravention of the 28 USCS 157.

5. Whether a bankruptcy court has jurisdiction to prejudicially convert an individual Chapter 11 case, in another Court, to an individual Chapter 7 case and consolidate it with a case wherein there is an order of denial of discharge to the spousal debtor; denial of exemptions and denial of dismissal.

6. Whether a Bankruptcy Court has the jurisdiction by use of its equitable powers to issue a writ of entry, i.e., forcible search and seizure warrant, in connection with the order to sale the property of the debtor without notice and hearing to all interested parties in violation of the Article III and the 4th, 5th and 14th amendment to the United States Constitution.

7. Whether the District Court is duty bound as an Article III Court to review the appointment of an interim chapter 7 trustee wherein there is prima facie evidence that the Trustee has been allowed to serve without producing an inventory by the Bankruptcy Court thereby giving the appearance of judicial indiscretion and alliances between fiduciaries.

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OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States Bankruptcy Appellate Panel appears as Appendix B, D, F and H to the petition and is unpublished.

The opinion of the Bankruptcy Court appears as Appendix C, E, G, and I to the petition and is unpublished.

STATEMENT OF JURISDICTION

For cases from Federal Courts:

1. The date on which the United States Court of Appeals for the Sixth Circuit entered its opinion is August 3, 2006.

2. No petition for rehearing was filed in said case.

3. An extension of time to file the petition for writ of certiorari was granted to and including December 31, 2006 by Justice Stevens.

4. The jurisdiction of this court is conferred by section 1254(1) of Title 28 United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, 4TH, 5TH, 14TH Amendments to the United States Constitution.

28 USCS 151, 157, 158, 455, 1285,1337; 11 USCS 105, 303, 341, 362 349, 350, 363, 522, 523, 524, 541, 701, 704, 706, 707, 727; 18 USCS 154; Rule 1017,2001, 2003, 2004, 2015, 4004, 4006, 6004 and 6005 of the Bankruptcy Rules

STATEMENT OF THE CASE

This is an appeal for review of the creation and supervision of the Bankruptcy Court as a unit of the District Court wherein there is no effective means of supervision of the Bankruptcy Court, as well as the appellate grant of power and procedure to the Bankruptcy Appellate Panel to judges that are not Article III judges. The appellant further calls for supervision of the 6th Circuit appellate Court for derogation of their jurisdictional appellate power; sanctioning the abuse of power of the bankruptcy court and affirming the grant of power to the Bankruptcy Appellate Panel.

It is appellant's contention that commencing from as early as 2002, the Bankruptcy Court has failed to carry out the mandate of the Bankruptcy Code and has subverted its provision under the rationale of orderly distributing assets for the benefits of all of the creditors. Yet 11 USCS 157 *et seq.* does not provide for the promulgation of rules, which contravene direct law. The equitable powers of the Bankruptcy Code do not transcend the clear mandate of the law. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988)

On February 26, 2002, the appellant, Larry Conway filed a voluntary individual bankruptcy petition under Chapter 11 of the Bankruptcy Reform Act of 1994.

Debtor attended the meeting of creditors and submitted a proposed plan paying 100% of all creditors, both secured and unsecured, within the time allowed by law. The debtor in exercise of his constitutional and statutory rights, refused to respond to discovery or to a second debtor examination based upon what he considered to be abuse of power by the Court and the denial of his statutory and constitutional rights.

On August 1, 2002, the United States Trustee moved to dismiss or, alternatively, convert Conway's case to an individual Chapter 7 for failure to attend the creditor's meeting, complete schedules and propose a plan. Factually the Debtor timely filed a proposed plan of reorganization in which he proposed to pay 100% of all debt. The Court did not allow the proposed plan to be voted on by the creditors. The Court denied the Motion to Dismiss Case and Granted the U.S. Trustee's Motion to Convert on November 7, 2002 and appointed P. Preston Wilson as the Chapter 7 Trustee. The debtor openly express his rejection of what he perceived to be the abuse of power by the Court of the involuntary individual Chapter 7 conversion and refused to attend the creditor's meeting. The debtor's position was that the Chapter 7 case of forced liquidation was unwarranted wherein he proposed a viable plan of 100% payment of the debt. Accordingly he considered the involuntary individual Chapter 7 case an unnecessary blight upon his credit record and work ethic. The debtor contends that his refusal to attend the Chapter 7 creditor's meeting or file schedules was his right under the 1st amendment to the United States Constitution.

During the entire proceedings, the bulk of the creditor's of the debtor were fully secured and acted to protect their interest. Numerous filings for Motions to lift the Automatic stay are evidenced within the docket sheet. Issues regarding orderly distribution of assets have never been a substantial issue of these creditors.

Preston Wilson was appointed by the Court as interim Trustee, prior to the first meeting of creditors in the involuntary, individual chapter 7 case. During the term of Preston Wilson's position as trustee he wholly failed to submit an inventory of the property of the estate pursuant to Rule 2015 of the Bankruptcy Rules. The Bankruptcy Court failed to mandate that the Chapter 7 Trustee adhere to the mandatory rules and requirements for accounting and inventory.

After the involuntary conversion to an individual Chapter 7, a creditor's meeting was mandated by law to be held no more than 40 days after the order of relief pursuant to Rule 2003 of the Bankruptcy Rules. Yet to date, the Court allowed the case to continue without dismissing the case from November 2002 over four (4) years to the present date for failure to attend the creditor's meeting as mandated by law even after the denial of discharge on February 2, 2004.

On March 7, 2003, Preston Wilson, the interim Trustee motioned the Court for dismissal of the case with prejudice for failure of the debtor to attend the creditor's meeting. June 5, 2003 the Bankruptcy Court denied the motion of the Trustee to dismiss the case with prejudice.

August 13, 2003, the interim Trustee filed a Motion for Writ of Entry into the residence of the debtor to conduct a 2004 Examination of the Premises and debtor. The Court

granted the Writ on August 28, 2003. Subsequently, the U.S. Trustee's office filed a complaint to deny discharge on October 27, 2003. The Court entered an order on February 3, 2004 denying the discharge to the debtor, Larry Conway.

Three months after the Court denied the discharge to the debtor, the Court granted the motion of the Trustee to sell the personal property of the debtor and for the assistance of the United States Marshall to enter the residence of the debtor on May 11, 2004. The debtors sought relief through a writ of mandamus and the 6th Circuit on August 10, 2004 denied the writ on the grounds that the petitioner had the availability to raise issues on appeal.

The Court after having approved the chapter 7 Trustee's appointed auctioneer granted a writ of entry to confiscate the property without notice to the debtors on October 25, 2004. On October 28, 2004, the Trustee, along with the U.S. Marshal entered the home of the debtor and proceeded to take everything in the home excepting the contents of one of nine bedrooms. The entry came without warning or notice. Initially, the debtor's were imprisoned in their bedrooms while the trustee and U.S. Marshal began the process of removing items from the house, including post petition, acquired property, exempted property and the Chapter 11 estate property of Marilyn Conway in violation of the congressional mandated automatic stay. Later the debtor's were allowed to leave their bedroom, at which point they hired a professional film crew to video, the activities of the Trustee. The trustee upon confiscating the items did not file an inventory of the items confiscated as mandated by law prior to the auctioning of the items. The Court took no action to mandate that the Trustee make and file an accounting pursuant to Rule 2015 of the Bankruptcy Rules.

On November 19, 2004, without mandating that the Trustee carry out his mandatory duty to file a complete inventory and present an accounting of the property of the estate prior to auctioning, the Bankruptcy Court granted an order authorizing the sale of the property by auction and for assistance of the United States Marshal. The debtor contended that the Court sanctioned the lower standards of the duty imposed upon a fiduciary under Bankruptcy law. *See United States v. Noland, Trustee for Debtor First Truck Lines, Inc.*, 517 U.S. 535 (1996); *Wolf v Weinstein*, 372 U.S. 633 (1968) Debtor immediately filed an emergency appeal with the request for Stay with the Bankruptcy Appellate Panel. The BAP denied the relief requested by the debtor(s) one day prior to the scheduled auction of the property confiscated. The debtor's effectively were denied a venue of appellate redress.

Finally on April 8, 2005,six months after the sale by the auctioneer, the Trustee filed an incomplete inventory. Thereafter over seven months after the auction of the estate, the Trustee filed a Report of Sale and Application for Approval of the Auctioneer's Commission. The debtor's contend that not even 1/3 of the items taken from their residence was listed in the inventory nor reflected in the auction sale. The debtor's video of the items taken upon execution of the writ shows prima facie that items taken from the home were not listed on the auctioneer's list. The debtor's contend that substantial amounts of property were missing from the inventory and accounting of the trustee and the auctioneer including but not limited to fine art, antiques, African artifacts (museum quality) and other furnishings. The debtor contends that the monies from the action were not fully reported.

As the appellant's case was proceeding, Marilyn Conway, the spouse of the debtor, filed for individual Chapter 11 protection on 12/21/04. Her case was assigned to Judge William H. Brown.

On January 10, 2005, after the taking of the personal property of Larry Conway and Marilyn Conway, the trustee in Larry Conway's case filed a motion to convert Marilyn Conway's chapter 11 case to a chapter 7 and to consolidate the two cases. On January 12, 2005, the Court granted the Motion of the Trustee.

Further on the same day, the Court denied the exemption in personal property or monies seized and sold by the Trustee.

The appellants sought judicial review of the order denying discharge, the order granting the sale of personal property and assistance of the U.S. Marshall; the order granting the writ of entry, the order authorizing the sale of their personal property through auction.

The appellants in raising these issues also referenced the involuntary conversion of the case of Marilyn Conway to a Chapter 7, consolidation and denial of exemptions, as well as the overall failure of the bankruptcy Court to follow the Bankruptcy Code.

On appeal to the Bankruptcy Appellate Panel, the Court held that all issues excepting the denial of discharge were dismissed for failure to prosecute. The appellant(s) raised the issue to the lower court that an error occurred in the filing of their brief in cause no 05-5358 into case no 05-5227, which had been dismissed by the Court. The 6th Circuit refused to address the error and reinstate their appeal. As to the

remaining claims, the court dismissed them for failure to prosecute. The Bankruptcy Appellate Panel found that there was no abuse of discretion regarding the denial of discharge.

The(s) appellant appealed to the 6th Circuit who again failed to review the record for fundamental error, despite having knowledge of the claims through the writ of mandamus. The 6th Circuit parroted the decision of the BAP in rendering its decision dated August 3, 2006.

It is the position of the appellants that the Bankruptcy Court failed to carry out the requirement of the law pursuant to the grant of jurisdiction under 28 USCS 157 which provides that bankruptcy judges may hear and determine all cases under Title 11 and all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments, subject to review under section 158 of this title.

The Bankruptcy Court failed and refused to implement 11 USCS 101 *et seq.* to issue order, process or judgment necessary or appropriate to carry out the provision of Chapter 11[1] as it relates specifically to the meeting of creditors[2]; automatic stay[3]; involuntary cases[4], effect of conversion[5]; effect of dismissal[6]; closing and reopening

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1. 11 USCS 105
2. 11 USCS 341
3. 11 USCS 362
4. 11 USCS 303
5. 11 USCS 348
6. 11 USCS 349

cases[7]; use, sale and lease of property[8]; exemptions[9]; exceptions to discharge[10]; effect of discharge[11]; property of the estate[12]; interim trustee[13]; duties of trustee[14]; conversion[15]; dismissal[16]; distribution of property of the estate[17]; and discharge[18], Bankruptcy Rule regarding appointment of trustee before order for relief in a Chapter 7 Liquidation Case[19]; Bankruptcy Rule regarding meeting of creditors[20]; Bankruptcy Rule regarding examination[21]; Bankruptcy Rule regarding duty to keep report, make reports and give notice of case[22]; Bankruptcy Rule regarding grant or denial of

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7. 11 USCS 350
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10. 11 USCS 523
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18. 11 USCS 727
19. Bankruptcy Rule 2001
20. Bankruptcy Rule 2003
21. Bankruptcy Rule 2004
22. Bankruptcy Rule 2015

discharge[23]; Bankruptcy rule regarding use, sale or lease of property[24] and Bankruptcy Rule regarding appraiser and auctioneers[25]

The appellate courts made no effort to corral the actions of the bankruptcy court which is a unit of the Article III District Court. The appellants contend that the Bankruptcy Court as a unit of the District Court pursuant to 28 USCS 151 has far exceeded its parameters and the supervisory courts to date have failed to act to control the abuse of power thereby abdicating their jurisdictional power pursuant to 28 USCS 43 and 28 USCS 1334.

Further the appellant contends that the grant of appellate power to the Bankruptcy Appellate Panel wherein there has not been a review of the actions by the District Court contravenes Article III of the Constitution. *See Northern Pipeline Const. Co. v Marathon Pipe Line Co.*, 458 U.S. 50 (1982)

REASONS FOR GRANTING THE PETITION

1. The Bankruptcy Amendment and Federal Judgeship Act of 1984 designated bankruptcy judges in regular active service in each judicial district as a unit of the District Court known as the Bankruptcy Court. The contention of the appellant is that the Bankruptcy Court herein has exceeded its authority as a unit of the District Court by appropriating orders that exceed 11 USCS 157 *et al.* in scope and definition.

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23. Bankruptcy Rule 4004

24. Bankruptcy Rule 6004

25. Bankruptcy Rule 6005

Based upon the actions taken by the Bankruptcy Court, the appellant contends that the current methodology of checks and balances is inadequate to ensure that the Bankruptcy Court does not exceed its authority. The failure of the appellate division(s) (Bankruptcy Appellate Panel and the 6th Circuit) to utilize their powers to review the activity of the bankruptcy Court sua sponte for fundamental errors of law and facts ensures that the Bankruptcy Court was unlawfully elevated to an Article III Court.

2. The appellant further contends that the Bankruptcy Appellate Panel jurisdictionally should be composed of District Court Judges who are in fact Article III Courts authorized to ensure that the appellate review is based upon the constitutional and statutory grant of powers pursuant to 28 USCS 1295.

3. The appellant contends that the Bankruptcy Court abused its equitable powers and that the Bankruptcy Appellate Panel sanctioned the broad base use of powers without substantively reviewing the Court's activities from the position of constitutional deprivation.

4. The appellant contends that the creation of the Bankruptcy Court as a unit of the District Court without creating a procedure that allows for review of the actions of said judges, absent proceeding procedurally as an appeal, inherently creates said Court as a Article III entity. The authority of the District Court to have discretionary power to abstain from hearing a bankruptcy case in the first instance pursuant to 11 USCS 1334(c)(1) is in effect the creation of the Bankruptcy Court as an Article III Court.

5. A review of the activities of the Bankruptcy Court herein reveals a broad base of judicial authority granted to the Trustee and others which has effectuated a taking in contravention of the law in that the Bankruptcy Court has failed to carry out it duties to ensure that 11 USCS 101 *et al.* is effectuated pursuant to law and that the requirements as it relates to accounting and inventory be imposed upon those persons entrusted with a fiduciary duty to act in accordance with the law.

6. To restrict the equitable jurisdictional powers of the Bankruptcy Court from issuing writs of entry without notice or hearing and to the detriment of interested parties.

7. To mandate that the Trustee appointed by the Court, interim or otherwise, adhere strictly to the mandatory requirement of filing complete inventory with the United States Trustee before the Court orders the sale, auction or distribution of assets of the estate.

8. To curtail the ability of the Court to continue the administration of the estate wherein there has been a denial of discharge in an individual Chapter 7 case.

9. To declare the conversion and consolidation of two separate bankruptcy cases unlawfully wherein there has been a complete stripping of the estate of one of the debtor's for alleged cause thereby resulting in a denial of discharge; forced sale; failure of inventory and denial of exemption to the detriment of the debtor whose case is consolidated and for whom there has not been a finding of cause resulting in punitive administration of the estate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 3, 2006

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 05-5225/05-5227/05-5358/05-5359

In re: Larry CONWAY,

Debtor-Appellant,

LARRY CONWAY and MARILYN CONWAY,

Appellants,

v.

PRESTON WILSON, Chapter 7 Trustee, and UNITED STATES Trustee for Region 8,

Appellees.

ON APPEAL FROM THE BANKRUPTCY APPELLATE PANEL FOR THE SIXTH CIRCUIT

OPINION

BEFORE: BOGGS and COLE, Circuit Judges, and ROSEN, District Judge.*

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* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

R. GUY COLE, Jr., Circuit Judge. In this consolidated appeal, Debtor-Appellant Larry Conway appeals four separate orders of the Bankruptcy Appellate Panel for the Sixth Circuit affirming orders entered by the bankruptcy court and his wife, Appellant Marilyn Conway, appeals three of those orders although she is only a party in two of the cases. For the following reasons we **AFFIRM** the orders of the Bankruptcy Appellate Panel in Case Nos. 05-5225, 05-5358, and 05-5359, and **DISMISS** the appeal in Case No. 05-5227 for lack of jurisdiction.

I. Background

A. Factual Background

On February 26, 2002, Larry Conway filed a voluntary bankruptcy petition under Chapter 11 of Bankruptcy Reform Act of 1994 (the "Bankruptcy Code"), 11 U.S.C. § 101 *et seq.*, his second Chapter 11 petition in four months. Conway listed assets in his accompanying bankruptcy schedules totaling $13,882,267. Included in these assets were: a principal residence valued at $1.76 million; a Mercedes-Benz automobile; furniture valued at $170,000; books, pictures, and artifacts valued at $980,000; and furs and jewelry valued at $100,000. Conway subsequently amended his bankruptcy schedules to include a Lexus automobile, but did not list its value. The aggregate value of the personal property listed by Conway was $1,160,000. Subsequently, and without explanation, Conway amended his schedule of assets, decreasing their combined value to $559,600.

Appendix A

On August 1, 2002, the United States Trustee moved to dismiss or, alternatively, convert Conway's case to a case under Chapter 7 of the Bankruptcy Code. The bankruptcy court set November 4, 2002, as the date for a hearing on the motion. Prior to the hearing date, the United States Trustee served written notice of his intent to conduct a deposition of Conway, and also served upon Conway a written set of interrogatories and request for production of documents. Conway did not appear for his deposition on the designated date nor did he provide answers to the interrogatories or produce any documents. The United States Trustee thereupon filed a motion to compel Conway's compliance with his discovery requests. In response, the bankruptcy court entered orders compelling Conway to appear for a deposition, and to file answers to the interrogatories and produce the requested documents. Conway failed to comply with either order: he neither appeared at the court-ordered deposition nor filed responses, as ordered, to the interrogatories and requests for production of documents.

On November 7, 2002, the bankruptcy court converted Conway's Chapter 11 case to a case under Chapter 7, and appointed P. Preston Wilson as the Chapter 7 trustee ("Wilson"). By statute, Wilson, as trustee, was required to "collect and reduce to money the property of the [bankruptcy] estate ... and close such estate as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. § 704(a). Conway appealed the order converting his case to a case under Chapter 7. The district court affirmed the bankruptcy court's order for conversion. Conway did not appeal the judgment of the district court.

Appendix A

A meeting of creditors pursuant to 11 U.S.C. § 341 was scheduled for December 4, 2002, notice of which was sent to Conway and all creditors. Despite notice, Conway did not appear, as required by the statute, at this meeting. Wilson rescheduled the meeting for January 8, 2003, at which time, despite notice, Conway failed to appear a second time. Wilson rescheduled the meeting of the creditors again for March 5, 2003. On January 10, 2003, Wilson filed a motion seeking an order from the bankruptcy court compelling Conway to appear at the March 5 meeting of the creditors. On February 4, 2003, after concluding that Conway had not filed an objection to Wilson's motion, the bankruptcy court granted the motion and entered an order compelling Conway to attend the March 5 meeting of creditors. Despite the bankruptcy court's order, Conway did not appear at the meeting of creditors.

On November 21, 2002, Wilson filed a motion in the bankruptcy court for an order compelling Conway to submit to an examination under Fed. R. Bank. P.2004. The bankruptcy court granted the motion; however, Conway failed to appear at the examination, again offering no basis for his absence.

As a result of Conway's continuing refusal to comply with the Bankruptcy Code and orders of the bankruptcy court, Wilson moved to dismiss Conway's bankruptcy case with prejudice. The bankruptcy court denied the motion, determining that it was in the best interest of the creditors that Conway's case continue under Chapter 7 so that Wilson, as trustee, could liquidate Conway's assets to satisfy the claims of his creditors.

On August 13, 2003, Wilson filed a motion pursuant to Bankruptcy Rule 2004 for a writ of entry to conduct an examination of Conway's real and personal property. On August 28, 2003, the bankruptcy court granted Wilson's request and issued a writ. On August 29, 2003, Wilson conducted the examination at Conway's residence with the assistance of deputy United States Marshals. As authorized by another writ of entry issued on October 24, 2004, Wilson seized personal property owned by Conway. Despite Conway's valuation of his property at $559,600, the assets seized by Wilson were ultimately appraised at $100,000 to $120,000, and were sold at auction for $76,647.50. Wilson has not been able to locate any additional assets.

On December 18, 2003, Marilyn Conway, Larry Conway's wife, filed a voluntary Chapter 11 petition. Marilyn Conway's petition was converted to a Chapter 7 case on March 29, 2004. In the pending proceedings, Marilyn Conway is a party only in Case Nos. 05-5227 and 05-5359, however she has filed a *pro se* appeal in three of the four cases before us (Case Nos. 05-5358, 05-5227, and 05-5359).

B. Procedural Background

1. Case No. 05-5225, *Larry Conway v. United States Trustee*

On October 27, 2003, the United States Trustee filed a complaint against Larry Conway objecting to the issuance of a bankruptcy discharge to Larry Conway. The United States Trustee cited three bases for his request to deny Conway a discharge: 1) Conway refused to appear for a deposition,

meeting of creditors, or examination pursuant to Bankruptcy Rule 2004, in violation of 11 U.S.C. § 727(a)(6)(C); 2) Conway concealed assets, in violation of § 727(a)(2)(B); and 3) Conway failed to explain the devaluation of assets, in violation of § 727(a)(5). Despite proper service of the complaint and summons, Conway failed to answer the complaint. On December 15, 2003, the United States Trustee filed a motion for default judgment. On January 8, 2004, the bankruptcy court convened a hearing on the motion and entered a default against Conway pursuant to Fed. R. Bank. P. 7055. The bankruptcy court, however, declined to enter a final judgment under Fed. R. Bank. P. 9021 against Conway without first holding an evidentiary hearing.

On January 13, 2004, the bankruptcy court issued an entry of default and notified the parties, including Conway, that it would conduct an evidentiary hearing on January 29, 2004, to consider whether it should enter a final judgment. On January 29, 2004, the bankruptcy court conducted the evidentiary hearing, which included the admission of testimonial and documentary evidence in support of the United States Trustee's request for default judgment. On February 3, 2004, the bankruptcy court entered a default judgment denying Conway's discharge and, in referencing the three grounds alleged by the United States Trustee as reasons for denying the discharge, specifically finding that Conway: 1) had engaged in concealment of property of the bankruptcy estate; 2) had not cooperated with Wilson, the trustee, as required by statute and court order; 3) had impeded Wilson in inventorying the bankruptcy estate; 4) had failed to turn over his assets to Wilson; 5) had failed to explain his

devaluation of his assets; and 6) had refused to appear at court-ordered examinations and depositions.

On February 11, 2004, Conway filed his notice of appeal of the default judgment to the Bankruptcy Appellate Panel ("BAP"). By order of December 28, 2004, the BAP affirmed the bankruptcy court's order denying Conway's discharge. On February 3, 2005, Conway filed a notice of appeal to this Court. On April 11, 2005, this Court consolidated this appeal with three other appeals filed by Conway, all of which are currently pending before us.

2. Case No. 05-5358, *Larry Conway v. Wilson (Chapter 7 Trustee)*

On March 29, 2004, Wilson filed a motion to sell personal property in which Conway-and hence the bankruptcy estate-had an interest, and for the assistance of the United States Marshal in conducting the sale. This motion sought authority to sell the estate's interest in property pursuant to 11 U.S.C. § 363(b), along with Marilyn Conway's interest in any such property pursuant to §§ 363(f) and (h).

On April 22, 2004, the bankruptcy court conducted a hearing on the motion. On May 11, 2004, the court granted the motion and entered an order allowing Wilson to sell the subject property and to receive the assistance of the United States Marshal in conducting the sale.

Larry and Marilyn Conway appealed this order to the BAP. On January 27, 2005, the BAP entered an order notifying the Conways of their procedural default and

advising them that their appeal would be dismissed for failure to prosecute unless the default was remedied within fifteen days. On February 17, 2005, the BAP dismissed the Conways' appeal for non-prosecution due to the Conways' failure to remedy their default. The Conways have appealed the BAP's dismissal to this Court. On April 11, 2005, this Court consolidated this appeal with three other appeals filed by Conway, all of which are currently pending before us.

3. Case No. 05-5227, *Larry and Marilyn Conway v. Wilson (Chapter 7 Trustee)*

On October 24, 2004, the bankruptcy court issued a writ of entry to the United States Marshal to assist Wilson in taking possession of personal property in which the Conways had an interest. On October 28 and 29, 2004, the Marshal executed the writ and peaceably forced entry into the Conways' home using a locksmith and by cutting a chain securing the door, an action necessitated by the Conways' refusal to allow the Marshal entry into their home. Once inside the home, Wilson took possession of all property in which the bankruptcy estate had an interest.

On November 14, 2004, the Conways appealed the writ of entry and sought a stay of the writ from the BAP. On November 19, 2004, the BAP denied the motion for a stay. On January 6, 2005, the BAP dismissed the appeal stating that the Conways "have filed a timely appeal from the May 11 order [and][w]hether the ... [c]ourt was correct in issuing a Writ in Aid of Execution is an issue that can be addressed" in that appeal. The Conways appeal the BAP's denial of their appeal to this Court. On April 11, 2005, this

Court consolidated this appeal with three other appeals filed by the Conways, all of which are currently pending before us.

4. Case No. 05-5359, *Larry and Marilyn Conway v. Wilson (Chapter 7 Trustee)*

On October 27, 2004, Wilson filed a notice of intent to sell the property of the bankruptcy estate by auction on November 20, 2004. The Conways filed an objection to the proposed sale. On November 18, 2004, the bankruptcy court conducted a hearing and denied the objection. On November 19, 2004, the bankruptcy court entered an order authorizing a sale by auction. On November 29, 2004, the Conways appealed this order to the BAP. On January 27, 2005, the BAP entered an order notifying the Conways of their procedural default and advising them that their appeal would be dismissed for non-prosecution unless the default was remedied within fifteen days. On February 17, 2005, the BAP dismissed the Conways' appeal for non-prosecution due to the Conways' failure to remedy their default. The Conways appeal the BAP's dismissal of their appeal to this Court. On April 11, 2005, this Court consolidated this appeal with three other appeals filed by the Conways, all of which are currently pending before us.

II. Standard of Review

In reviewing an appeal from the BAP where the BAP issues a decision on the merits, we review the bankruptcy court's decision. *Corzin v. Fordu (In re Fordu),* 201 F.3d 693, 696 n. 1 (6th Cir.1999). Generally, we review the

bankruptcy court's conclusions of law *de novo* and its factual findings for clear error. *Id.* However, when the bankruptcy court enters a default judgment, we use a deferential standard of review, *Dobin v. Taiwan Mach. Trade Cntr. Corp. (In re Victor Int'l),* 97 Fed.Appx. 365, 368 (3d Cir.2004), and review the bankruptcy court's decision for abuse of discretion. *Hamlett v. Amsouth Bank (In re Hamlett),* 322 F.3d 342, 345 (4th Cir.2003). Further, in cases such as this one where the BAP dismissed an appeal for non-prosecution, we review the BAP's dismissal directly for abuse of discretion. *In re Donovan,* 871 F.2d 807, 808 (9th Cir.1989).

III. Discussion

A. Case No. 05-5225, *Larry Conway v. United States Trustee*

The law is clear: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Fed. R. Bankr.P. 7055; Fed.R.Civ.P. 55(a). It is undisputed that the United States Trustee filed a complaint against Larry Conway and that Conway failed to plead or otherwise defend by filing an answer or an appropriate motion. After an entry of default, a court may enter a judgment of default. Fed. R. Bankr.P. 7055; Fed.R.Civ.P. 55(a). In this case, Larry Conway never asked the bankruptcy court to set aside the default nor did he attempt to show good cause for relief as to the default.

Appendix A

As the BAP correctly found:

> The only argument that the Debtor makes regarding the propriety of the default judgment is his contention that the judgment is invalid due to the bankruptcy court's failure to make specific findings of fact and conclusions of law on the merits of the [United States Trustee's] complaint. Rule 52(a) of the Federal Rules of Civil Procedure, made applicable in bankruptcy adversary proceedings by Rule 7052 of the Federal Rules of Bankruptcy Procedure, does require findings and conclusions, but only in "actions tried upon the facts without a jury or with an advisory jury. . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule." . . . Moreover, although unnecessary the bankruptcy court did make oral findings of fact and conclusions of law on the merits at the hearing on January 29, 2004, and Rule 52(a) expressly provides that "[i]t will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence."

In re: Conway, No. 04-8025, at 5-6 (B.A.P. 6th Cir. Dec. 28, 2004) (citations omitted). We find no reason to disturb this well-reasoned analysis. It was appropriate for the bankruptcy court to first enter a Rule 7055 default and then, after a hearing, to enter a default judgment under Fed. R. Bank. P. 9021.

It is clear that Conway failed repeatedly to respond to his legal obligations imposed both by statute and court order when he: refused numerous times to appear at the meeting of the creditors; refused to submit to a Rule 2004 examination; refused to submit to a deposition despite a court order requiring him to appear; refused to answer discovery requests despite a court order requiring him to answer; and refused to attend and give testimony at the hearing on his default. It is likewise clear that the bankruptcy court complied with all procedural and substantive requirements and that Conway was afforded notice and an opportunity to be heard prior to the entry and judgment of default.

Finally, under 11 U.S.C. § 727(a)(2)(B), a discharge is properly denied if:

> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed or has permitted to be transferred, removed, destroyed, mutilated, or concealed-
>
> . . . (B) property of the estate after the date of the filing of the petition. . . .

Id. The Bankruptcy Code further provides that a debtor has an affirmative obligation to "surrender to the trustee all property of the estate." 11 U.S.C. § 521(a)(4). It is clear from the record that the bankruptcy court did not err in its determination that Larry Conway violated § 727(a)(2)(B) and that he did not comply with his other statutory obligations.

We therefore affirm the BAP's affirmance of the bankruptcy court's entry of a default judgment under Fed. R. Bank. P 9021 against Larry Conway.

B. Case No. 05-5358, *Larry Conway v. Wilson (Chapter 7 Trustee)*

Conway appeals the bankruptcy court's order granting Wilson's motion to sell property of the bankruptcy estate. We find that the BAP, in dismissing this appeal for non-prosecution, complied with due process and, therefore, did not abuse its discretion. On January 27, 2005, the BAP entered an order notifying the Conways of their procedural default and advising them that their appeal would be dismissed for non-prosecution unless the default was remedied within fifteen days. On February 17, 2005, the BAP dismissed the Conways' appeal for non-prosecution due to the Conways' failure to remedy their default.

A bankruptcy appellate panel does not abuse its discretion in dismissing an appeal for non-prosecution if it complies with due process. *See, e.g., Fuentes-Argueta v. INS,* 101 F.3d 867, 868 (2d Cir.1996). In other words, when the BAP dismisses an appeal for non-prosecution, so long as due process is afforded to a party prior to his appeal being dismissed, we will deem that appeal waived and will not review the decision of the bankruptcy court. Because the Conways were provided notice and an opportunity by the BAP to remedy their default and then failed to do so, their appeal is deemed waived.

C. Case No. 05-5227, *Larry and Marilyn Conway v. Wilson (Chapter 7 Trustee)*

The Conways appeal an order of the BAP denying the Conways' request to stay the writ allowing Wilson to enter their residence. A writ of entry is not a final appealable order under 28 U.S.C. § 158(a); therefore, we lack jurisdiction under 28 U.S.C. § 158(d)(1). Even if we had jurisdiction, the Conways filed an appeal-our Case No. 05-5358-from the underlying order which, as discussed in Section III.B., is properly denied. As we do not have jurisdiction to entertain this appeal, it is hereby dismissed.

D. Case No. 05-5359, *Larry and Marilyn Conway v. Wilson (Chapter 7 Trustee)*

The Conways appeal the bankruptcy court's order authorizing a sale by auction of property of the bankruptcy estate. On January 27, 2005, the BAP entered an order notifying the Conways of their procedural default and advising them that their appeal would be dismissed for non-prosecution unless the default was remedied within fifteen days. On February 17, 2005, the BAP dismissed the Conways' appeal for non-prosecution due to the Conways' failure to remedy their default.

Because the Conways were provided notice and an opportunity by the BAP to remedy their default, for the reasons stated in Section III.B., their appeal in this case is deemed waived.

IV. Conclusion

For the foregoing reasons, we **AFFIRM** the orders of the Bankruptcy Appellate Panel in Case Nos. 05-5225, 05-5358, and 05-5359 and **DISMISS** the appeal in Case No. 05-5227 for lack of jurisdiction.

APPENDIX B — ORDER OF THE BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT FILED FEBRUARY 17, 2005

BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT

Case No: 04-8047

In re:

LARRY CONWAY; MARILYN JOYCE CONWAY

Debtors - Appellants

v.

PRESTON WILSON; UNITED STATES MARSHAL

Appellees

ORDER

On 1/27/2005 an order was entered notifying the appellants of a procedural default and advising the appellants that this appeal would be dismissed for non-prosecution unless the default was remedied within fifteen days. As of the present date, the default has not been remedied, the appellants have not filed a brief and joint appendix.

Accordingly, it is **ORDERED** that this appeal is dismissed for non-prosecution.

Appendix B

ENTERED PURSUANT TO
6th Cir. BAP LBR 8070-1(a)
Leonard Green, Clerk

s/ Leonard Green

APPENDIX C — ORDER GRANTING MOTION TO SELL PERSONAL PROPERTY AND FOR ASSISTANCE OF MARSHAL'S IN CONDUCTING SALE OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION DATED MAY 10, 2004

s/ Jennie D. Latta
Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Case No. 02-23559-L

Chapter 7

IN RE:

CONWAY, LARRY,

Debtor.

ORDER GRANTING MOTION TO SELL PERSONAL PROPERTY AND FOR ASSISTANCE OF MARSHAL'S IN CONDUCTING SALE

This Cause came on April 22, 2004, upon the MOTION TO SELL PERSONAL PROPERTY AND FOR ASSISTANCE OF U.S. MARSHAL'S IN CONDUCTING SALE ("Motion to Sell") filed by the Chapter 7 Trustee

Appendix C

("Trustee"), the OBJECTIONS OF MARILYN CONWAY AND LARRY CONWAY TO MOTIONS TO SELL PERSONAL PROPERTY; FOR ASSISTANCE OF UNITED STATES MARSHAL'S IN CONDUCTING SALE; . . . ("Objections") filed In re: Marilyn Conway, No. 03-41589-B, the statements of the Chapter 7 Trustee, and the entire record in the Cause, from all of which

A. IT APPEARS TO THE COURT that the Trustee's Motion to Sell was set for 10:00 a.m. on April 22, 2004, and that by 11:30 a.m., April 22, 2004, neither Larry Conway or Marilyn Conway had appeared for the hearing and the Court proceeded with the Motion to Sell;

B. IT FURTHER APPEARS TO THE COURT that the Trustee was seeking preliminary approval to proceed with the sale of the Conways' personal property and that at such time as specific arrangements regarding the sale have been made, the Trustee will file notice of the date, time, location and circumstances of the sale and serve same on all creditors and interested parties;

C. IT FURTHER APPEARS TO THE COURT that first mortgage holder Eastern Savings Bank has foreclosed on the Conways' residence at 6099 Shady Grove Road so the Conways' no longer own 6099 Shady Grove Road;

D. IT FURTHER APPEARS TO THE COURT from the statements of Joel Giddens, attorney for Eastern Savings Bank, that a Judgement of Possession for 6099 Shady Grove Road was obtained in the General Sessions Court of Shelby County, Tennessee, that the Judgement has been appealed,

but that no bond has been posted nor any stay issued preventing Eastern Savings Bank from obtaining a Writ of Possession and taking physical possession of 6099 Shady Grove Road;

E. IT FURTHER APPEARS TO THE COURT that there would be substantial expense and risk of damage involved in moving the Conways' personal property to another location to conduct such a sale there, and that the most expeditious location for a sale of the Conways' personal property is 6099 Shady Grove Road;

F. IT FURTHER APPEARS TO THE COURT that the assistance of U.S. Marshal in obtaining possession of the personal property located at 6099 Shady Grove Road is warranted;

G. IT FURTHER APPEARS TO THE COURT that there is good cause shown to grant the Trustee's Motion to Sell the Personal Property of the Debtor, Larry Conway and the Debtor's spouse, Marilyn Conway, under Section 363 of the Code, specifically including, without limitation, 363(b), (f), (g) and (h).

IT IS, THEREFORE, ORDERED:

1. That the Trustee's Motion to Sell the personal property of Larry Conway and Marilyn Conway under Section 363 of the Code, including without limitation, Subsection 363 (b), (f), (g) and (h), should be, and hereby is granted.

Appendix C

2. That at such time as the Trustee has made arrangements to conduct the sale of the Debtor's property, the Trustee shall give adequate notice as required by the Bankruptcy Code and Rules.-

3. That the Trustee should be, and hereby is, authorized to receive the assistance of the U.S. Marshal in obtaining and securing the Conways' personal property and in the conduct of the sale, and the Trustee and the Marshal are authorized to request and obtain such writs and other process as may be appropriate to effectuate the sale.

Approved by:

/s/ P. Preston Wilson
P. Preston Wilson, BPR#4304
Attorney for the Trustee
88 Union Avenue, 14th Floor
Memphis, TN 38103
Phone (901) 523-1110
Fax (901) 523-1110

APPENDIX D — OPINION OF THE BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT FILED DECEMBER 28, 2004

BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT

No. 04-8025

In re: LARRY PAUL CONWAY,

Debtor.

RICHARD F. CLIPPARD,
United States Trustee, Region 8,

Plaintiff-Appellee,

v.

LARRY PAUL CONWAY,

Defendant-Appellant.

Appeal from the United States Bankruptcy Court
for the Western District of Tennessee, Western Division
Chapter 7 Case No. 02-23559, Adv. No. 03-1059

Submitted: December 21, 2004

Decided and Filed: December 28, 2004

Appendix D

Before: COOK, HOWARD, and WHIPPLE, Bankruptcy Appellate Panel Judges.

OPINION

PER CURIAM. Larry Paul Conway (the "Debtor") appeals an order denying him a discharge due to his failure to answer the complaint filed by Richard F. Clippard, United States Trustee, Region 8 (the "UST") and his failure to appear at the hearing and the continued hearing on entry of a default judgment. Upon examination of the record and the briefs, the Panel unanimously agrees that oral argument is not needed because the decisional process would not be aided by oral argument. See Fed. R. Bankr. P. 8012. For the reasons that follow, we conclude that the order on appeal should be **AFFIRMED.**

I. ISSUES ON APPEAL

The Debtor lists twenty issues on appeal, but none of them is pertinent to the order on appeal. Rather, the actual issue presented is whether the bankruptcy court erred in granting a default judgment sustaining the UST's objection to the Debtor's discharge.

II. JURISDICTION AND STANDARD OF REVIEW

The order on appeal is "final," *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 721 (B.A.P. 6th Cir. 1999), and may, therefore, be appealed as of right. 28 U.S.C. § 158(a)(1). The United States District Court for the Western District of Tennessee has authorized appeals to the Bankruptcy

Appellate Panel, and neither party has timely elected to have this appeal heard by the district court. 28 U.S.C. §§ 158(b)(6), (c)(1). Accordingly, the Panel has jurisdiction to decide this appeal.

"Decisions to enter judgment by default are committed to the [trial] court's sound discretion, and our review is for abuse of discretion." *Dennis Garberg & Assocs., Inc. v. Pack-Tech Int'l Corp.*, 115 F.3d 767, 771 (10th Cir. 1997); *accord, Pretzel & Stouffer, Chartered v. Imperial Adjusters, Inc.*, 28 F.3d 42, 45 (7th Cir. 1994). A court "abuses its discretion only when it relies upon clearly erroneous findings of fact or when it improperly applies the law or uses an erroneous legal standard." *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 (6th Cir. 1988).

III. FACTS

On February 26, 2002, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On September 9, 2002, the Debtor amended his Schedule B (Personal Property) to reduce the value of his furniture from $170,000 to $19,600, to reduce the value of his books, pictures, and artifacts from $980,000 to $490,000, and to reduce the value of his furs and jewelry from $100,000 to $50,000. The amendment did not explain these reductions, the Debtor subsequently refused to provide an explanation in response to the UST's discovery requests, and he refused to testify at a deposition and a § 341(a) meeting of creditors.

On November 7, 2002, the bankruptcy court converted the case to Chapter 7, and P. Preston Wilson (the "Trustee")

was appointed Chapter 7 trustee. On November 18, 2002, the Debtor appealed that order to the United States District Court, but leave to appeal was thereafter denied.[1] On November 21, 2002, the Trustee filed a motion to conduct a Rule 2004 examination of the Debtor and his property, stating that the Debtor claimed to have possession of $490,000 worth of artifacts, $15,000 in wearing apparel, and $50,000 in furs and jewelry. The motion was granted on January 6, 2003, but the Debtor repeatedly refused the Trustee entrance to his residence until, on August 29, 2003, the United States Marshal served a writ of entry on the Debtor.

On May 27, 2003, counsel for the Debtor was granted leave to withdraw. On October 27, 2003, the UST filed a complaint objecting to the Debtor's discharge. The complaint sought to bar the discharge on the grounds that (1) the Debtor's refusal to permit the Trustee access to his residence constitutes the concealment of property of the estate within

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1. A review of the bankruptcy court's docket reveals that the Debtor appealed no less than eleven orders to the United States District Court or the Bankruptcy Appellate Panel (in addition to the conversion order and the order on appeal in this case). In all but one of those cases, the appeals were dismissed, leave to appeal was denied, or the bankruptcy court was affirmed. Four of those dispositions were appealed to the United States Court of Appeals for the Sixth Circuit, but three of those appeals were dismissed and the District Court was affirmed in the fourth. In addition, the Debtor appealed to the Sixth Circuit the order of the District Court denying the Debtor's motion to withdraw the reference, and that appeal was dismissed. Moreover, the Sixth Circuit dismissed an appeal of an order denying the Debtor's motion to consolidate appeals and denied the Debtor's petition for writs of mandamus and prohibition in another case.

the meaning of § 727(a)(2)(B) of the Bankruptcy Code, (2) the Debtor's refusal to explain the devaluations set forth in his amended Schedule B constitutes a failure satisfactorily to explain a loss or deficiency of assets within the meaning of § 727(a)(5) of the Code, and (3) the Debtor's refusal to provide discovery and testimony constitutes a refusal to respond to material questions approved by the court and to testify within the meaning of Code § 727(a)(6)(C).

A summons was issued on October 29, 2003, and process was served on October 31, 2003. The Debtor did not timely file an answer, so the UST filed a motion for a default judgment on December 15, 2003. A hearing on the motion was scheduled for January 8, 2004, at which time the Debtor did not appear and following which the bankruptcy court entered the Debtor's default and scheduled a further hearing for January 29, 2004, on whether a default judgment should be entered. At the conclusion of that hearing, at which the Debtor again failed to appear,[2] the court made oral findings of fact and conclusions of law (Tr., at 37-41) and, on February 4, 2004, the court entered the judgment denying discharge that is on appeal. The Debtor timely filed a notice of appeal (albeit in the bankruptcy case, rather than the adversary proceeding) on February 11, 2004.

IV. DISCUSSION

Rule 55 of the Federal Rules of Civil Procedure, made applicable in bankruptcy adversary proceedings by Rule 7055

2. The Debtor's failure to appear at the January 8 and January 29 hearings was in contravention of his obligation to "attend the hearing on a complaint objecting to discharge and testify, if called as a witness." Fed. R. Bankr. P. 4002(2).

of the Federal Rules of Bankruptcy Procedure, provides that, "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(a). The UST's complaint sought a judgment against the Debtor for affirmative relief, and there is no issue that the Debtor failed to plead or otherwise defend by filing an answer or motion to dismiss. *See* Fed. R. Bankr. P. 7012; Fed. R. Civ. P. 12. After the entry of default, the court may enter a judgment by default. Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(b)(2). The Debtor did not ask the bankruptcy court to set aside the default or make any attempt to show "good cause" for relief from the entry of default or any grounds for relief from the default judgment. *See* Fed. R. Bankr. P. 7055, 9024; Fed. R. Civ. P. 55(c), 60(b).

The only argument that the Debtor makes regarding the propriety of the default judgment is his contention that the judgment is invalid due to the bankruptcy court's failure to make specific findings of fact and conclusions of law on the merits of the UST's complaint. Rule 52(a) of the Federal Rules of Civil Procedure, made applicable in bankruptcy adversary proceedings by Rule 7052 of the Federal Rules of Bankruptcy Procedure, does require findings and conclusions, but only in "actions tried upon the facts without a jury or with an advisory jury. . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule." The proceeding against the Debtor was not tried on the merits, so findings and

conclusions on the merits were not necessary; the well-pleaded allegations of the complaint in effect constitute findings of fact. *See, e.g., Adriana Intl Corp. v. Thoeren,* 913 F.2d 1406, 1414 (9th Cir. 1990); *Brown v. Kenron Aluminum & Glass Corp.,* 477 F.2d 526, 531 (8th Cir. 1973); *Westinghouse Elec. Corp. v. Rio Algom Ltd. (In re Uranium Antitrust Litig.),* 473 F. Supp. 382, 390-91 (N.D. III. 1979), *remanded on other grounds,* 617 F.2d 1248 (7th Cir. 1980). Viewed another way, the only issues presented by the UST's motion related to whether the Debtor was in default and the UST was entitled to a default judgment, and the bankruptcy court's order made findings of fact and conclusions of law with respect to those issues. Moreover, although unnecessary the bankruptcy court did make oral findings of fact and conclusions of law on the merits at the hearing on January 29, 2004, and Rule 52(a) expressly provides that "[i]t will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence."

V. CONCLUSION

For the foregoing reasons, the bankruptcy court's order barring the Debtor's discharge is hereby **AFFIRMED.** The United States Trustee's Motion Regarding Items in the Appendix that was filed on October 19, 2004, and the Appellee's Motion Regarding Enlargement of the Record that was filed on November 12, 2004, are denied as moot.

APPENDIX E — ORDER DENYING DISCHARGE OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION DATED FEBRUARY 2, 2004

s/ Jennie D. Latta
Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Case No. 02-23559-JDL

Chapter 7

In re: LARRY PAUL CONWAY

DEBTOR,

RICHARD F. CLIPPARD,
UNITED STATES TRUSTEE, REGION 8,

Plaintiff,

vs.

LARRY PAUL CONWAY,

Defendant.

Appendix E

ORDER DENYING DISCHARGE

This matter came before the Court on January 29, 2004 upon the Complaint Objecting to Discharge ("Complaint") filed by the United States Trustee for Region 8 ("UST"); upon the documents admitted into evidence; upon the testimony of P. Preston Wilson, Esquire, the Chapter 7 Trustee; upon the absence of an answer to the Complaint; upon the absence of the Debtor/Defendant, Larry Paul Conway ("Defendant"), at the January 29, 2004 hearing; and upon the entire record herein.

It appears to the Court that, on January 8, 2004, the Court entered a default against the Defendant as requested by UST in the Motion for Default Judgment; that the Court set over until January 29, 2004 an opportunity for the Court to take evidence concerning whether a final judgment should be entered denying a discharge to the Defendant; that the Defendant did not appear either on January 8, 2004 or January 29, 2004; that the Court has considered all of the evidence presented on January 29, 2004; and that the Court finds that the Defendant should be denied a discharge, pursuant to the causes presented by UST, being 11 U.S.C. § 727(a)(2)(B); 11 U.S.C. § 727(a)(5); and 11 U.S.C. § 727(a)(6)(C).

ACCORDINGLY, the Court shall and does hereby deny a discharge to Larry Paul Conway, pursuant to 11 U.S.C. § 727(a)(2)(B); 11 U.S.C. § 727(a)(5); and 11 U.S.C. § 727(a)(6)(C); that all debts of Larry Paul Conway existing as of the date of the filing of the instant bankruptcy case shall not be subject to discharge in the instant case or any future bankruptcy case; that the Clerk of the Court is directed

to enter a judgment for the United States Trustee, pursuant to F.R.B.P. 9021; and that the Clerk of the Court is directed to file a copy of this Order both in the adversary proceeding file and in the main case file.

Approved for entry:

/s/ Sean M. Haynes, Trial Attorney (#14881)
United States Department of Justice
Office of United States Trustee
200 Jefferson Avenue, Suite 400
Memphis, TN 38103
(901) 544-3486

APPENDIX F — ORDER OF THE BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT FILED JANUARY 6, 2005

BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT

No. 04-8088

LARRY PAUL CONWAY; MARILYN CONWAY,

Appellants,

v.

P. PRESTON WILSON; Chapter 7 Trustee, et al.,

Appellees.

ORDER

Before: AUG, GREGG, and WHIPPLE, Bankruptcy Appellate Panel Judges.

The appellants, Larry Paul Conway, the Chapter 7 Debtor, and Marilyn Conway, his spouse, are appealing a October 24, 2004, writ of entry directed to the United States Marshal for the Western District of Tennessee. On November 15, 2004, the appellants moved to stay the writ. The Trustee filed a response in opposition on November 17, 2004, and moved for dismissal of the appeal. An order was entered on November 19, 2004, denying a stay. The seven day time period for filing a response in opposition to the Trustee's

motion to dismiss has now expired. See Fed. R. Bankr. P. 8011(a). No response has been filed.

The October 24 writ was issued pursuant to a May 11, 2004, order granting the Trustee's motion to sell personal property and for the assistance of the U.S. Marshal in conducting the sale. The appellants have filed a timely appeal from the May 11 order, which is docketed as Case No. 04-8047. Whether the district court was correct in issuing a writ of entry in aid of execution is an issue that can be addressed on appeal in Case No. 04-8047.

Accordingly, the trustee's motion to dismiss is **GRANTED** on the ground that this is a duplicative appeal.

ENTERED BY ORDER OF THE PANEL
s/ Leonard Green
Clerk

APPENDIX G— WRIT OF ENTRY OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION DATED OCTOBER 25, 2004

s/ Jennie D. Latta
Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Case No. 02-23559-L

Chapter 7

IN RE:

CONWAY, LARRY,

Debtor.

WRIT OF ENTRY

TO: United States Marshal for the Western District of Tennessee

Based upon the Court's Order Granting Motion to Sell Personal Property and for Assistance of Marshal in Conducting Sale, entered May 11, 2004, there is a good cause shown to require that the Chapter 7 Trustee be given access to the Debtor's residence at 6099 Shady Grove Road, Memphis, Tennessee, by force if necessary, for the purpose

of removing the personal property and art objects of the Debtor and the Debtor's spouse, Marilyn Conway, as listed in the Debtor's schedules filed in this case under Title 11, U.S. Code for sale by the Trustee.

IT IS, THEREFORE, ORDERED:

1. That the United States Marshal or his designated agents, employees and representatives be, and hereby are, authorized and directed to enter the premises known as 6099 Shady Grove Road, Memphis, Tennessee, and to provide access to said premises to the Chapter 7 Trustee, and such additional persons as the Trustee may require to assist him, to remove personal property and art objects of the Debtor and Debtor's spouse, Marilyn Conway, from within said residence for the purpose of sale.

2. That the United States Marshal or his designated agents, employees and representatives should be, and hereby are, authorized to use such force as may be necessary to enter the Debtor's residence for the purposes stated above and to maintain the peace while the Trustee conducts his removal of the personal property and art objects; PROVIDED, HOWEVER, that in making this entry the United States Marshal and his designated agents, employees and representatives are directed to enter the residence during daylight hours within fifteen (15) days of this Order.

APPENDIX H — ORDER OF THE BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT FILED FEBRUARY 17, 2005

BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT

Case No: 04-8100

In re:

LARRY CONWAY; MARILYN JOYCE CONWAY

Debtors

ORDER

On 1/27/2005 an order was entered notifying the appellants of a procedural default and advising the appellants that this appeal would be dismissed for non-prosecution unless the default was remedied within fifteen days. As of the present date, the default has not been remedied, the appellants have not filed a designation of the record and a statement of the issues with the U.S. Bankruptcy Court.

Accordingly, it is **ORDERED** that this appeal is dismissed for non-prosecution.

ENTERED PURSUANT TO
6th Cir. BAP LBR 8070-1(a)
Leonard Green, Clerk

s/ Leonard Green

APPENDIX I — ORDER AUTHORIZING AUCTION SALE OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION DATED NOVEMBER 18, 2004

s/ Jennie D. Latta
Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Case No. 02-23559-JDL

Chapter 7

IN RE:

LARRY P. CONWAY

Debtor.

ORDER AUTHORIZING AUCTION SALE

This cause came on upon the ORDER GRANTING MOTION TO SELL PERSONAL PROPERTY AND FOR ASSISTANCE OF MARSHAL'S IN CONDUCTING SALE ("Order Authorizing Sale") entered May 10, 2004, the NOTICE OF AUCTION SALE ("Notice of Auction Sale") set for November 20, 2004, filed with the Court on October 27, 2004, by the Chapter 7 Trustee ("Trustee"), OBJECTION TO PROPOSED ILLEGAL AND FRAUDULENT SALE

Appendix I

AND NOTICE OF AUCTION SALE SET FOR NOVEMBER 20, 2004 BY JOHN ROEBUCK & ASSOCIATES INC., AND SWORN VERIFICATION OF LARRY CONWAY AND MARILYN CONWAY IN SUPPORT THEREOF, ("Objections") filed by the Debtor and his spouse, Marilyn Conway the statements and arguments in open Court of counsel for the Trustee and of the Debtor Larry P. Conway ("Mr. Conway") and the Debtor's spouse, Marilyn Conway ("Mrs. Conway") and the entire record in the cause, from all of which

IT APPEARS TO THE COURT that, not withstanding the denial of discharge of Mr. Conway, his Chapter 7 case No. 02-23559, continues and denial of the discharge does not constitute grounds to stay or prevent the auction sale;

IT FURTHER APPEARS TO THE COURT that the Notice of the Auction Sale is adequate under the Bankruptcy Code and Rules;

IT FURTHER APPEARS TO THE COURT that the Court's only contact with Mr. and Mrs. Conway has been in open court, (except for the Court's visit to the Coach and Four property on Lamar Avenue, Memphis, Tennessee,) and there is no bias towards the Conways and no cause for the Court to recuse itself from hearing the case;

IT FURTHER APPEARS TO THE COURT for the reasons set forth above and upon the findings of fact and conclusions of law set forth in the Court's oral ruling following the hearing on the Objection to the Notice of

Auction Sale that the Objection is not well taken and should be overruled.

IT IS, THEREFORE, ORDERED:

1. That the Objection to the Notice of Auction Sale should be, and hereby is, overruled and the Trustee should be, and hereby is, authorized to proceed with the auction sale as set forth in the Notice of Auction Sale.

2. That if any person asserts he or she owns property in possession of the Trustee which is not owned by Mr. Conway or by Mr. and Mrs. Conway as tenants by the entireties, jointly or as tenants in common, and such person provides the Trustee with adequate and appropriate documentation of such ownership interests, the Trustee should be, and hereby is, authorized and directed to remove such property from the auction sale and return it to such individual.

APPROVED BY:
/s/ P. Preston Wilson
P. Preston Wilson (BPR # 4304)
Attorney for the Trustee
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